

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ALVIN C. FOX,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

(C902123806)

DOCKET NUMBER
SF08319110218

DATE: OCT 09 1991

Alvin C. Fox, Chula Vista, California, pro se.

Connie Torrillo, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on a petition for review filed by the Office of Personnel Management (OPM) from the March 11, 1991, initial decision that reversed its reconsideration decision denying the appellant's application for service credit under the Civil Service Retirement System (CSRS). For the reasons set forth below, the Board GRANTS OPM's petition for review and REVERSES the initial decision. OPM's reconsideration decision is AFFIRMED.

BACKGROUND

By application dated June 24, 1990, the appellant, a Department of the Navy employee, sought retirement credit under the CSRS for service he performed between 1959 and 1974 under a series of personal service contracts with the Department of the Navy while he was employed by Philco-Ford Company. Agency File, Tab 4, Subtab 5. The Navy rejected the application as untimely filed because it was not submitted by January 8, 1990, the deadline set forth in the statute. See Pub. L. No. 100-238, Title I, § 101, 101 Stat. 1749, 1750 (Jan. 8, 1988).¹ See also 5 C.F.R. § 831.309(c) (1988).² The Navy indicated that it was proper to reject the appellant's application as untimely, notwithstanding its acknowledgment that the FPM Bulletin that transmitted the new personal service regulations to Federal agencies was not received by the appellant's command until May 1990, well after the

¹ The statute provides, in pertinent part, that:

Subject to the making of a deposit under section 8334(c) of title 5, United States Code, upon application to the Office of Personnel Management within 2 years after the date of enactment of this Act [January 8, 1988], any individual who is an employee (as defined by section 8331(1) or 8401(11) of such title) on such date shall be allowed credit....

² Pursuant to 5 C.F.R. § 831.309(c) (1988):

Credit for service under a personal service contract under paragraph (b)(1) of this section may not be allowed unless application for such service is made on a Standard Form 2803 and the application is received by the appropriate agency on or before January 8, 1990.

expiration of the filing deadline. Agency File, Tab 4, Subtab 4. Based on the Navy's rejection, the appellant sought reconsideration from OPM. *Id.* at Subtab 3.

In upholding the Department of the Navy's decision, OPM took the position that the appellant's application was untimely filed, and that it lacked authority to waive the statutory filing deadline. *Id.* at Subtab 2.

On appeal to the Board's San Francisco Regional Office, the appellant continued to argue that he was not properly notified about the new statute until after the deadline for filing applications had passed. Appeal File, Tab 1.

In his initial decision, the administrative judge first considered the substance of the FPM Bulletin that transmitted the personal service regulations to the agencies. Agency File, Tab 4, Subtab 6. He noted that the Bulletin contained a statement that OPM was required to ensure that its regulations that applied to individuals or organizations outside OPM were posted in offices of Federal agencies, that the Bulletin cited 5 U.S.C. § 1103(b)(2) as support for placing this responsibility on OPM, and that OPM's regulations at 5 C.F.R. §§ 110.101 and 110.102, cited in the Bulletin, also obligated OPM to transmit the regulations to Federal agencies. Initial Decision (I.D.) at 4. Finding that, for whatever reason, OPM failed to transmit the personal service regulations to the Department of the Navy in a timely fashion, the administrative judge found that OPM thereby failed to provide notice of the filing deadline to the employees of the

appellant's command, as required by the cited statute and regulations. *Id.*

The administrative judge further found, based on the legislative history of Pub. L. No. 100-238, that it was Congress' intention to provide consistent interpretation of the rules governing personal service contract retirement credit, and to ensure that affected individuals received timely notice of those rules. *Id.* at 5. He concluded that, under these circumstances, it would frustrate Congress' intent to defer to OPM's view that it lacked authority to waive the statutory filing deadline. Accordingly, the administrative judge determined that waiver was appropriate, and he reversed OPM's reconsideration decision.³ *Id.* at 5-6.

ALLEGATIONS ON PETITION FOR REVIEW

In its petition for review, OPM argues that 5 U.S.C. § 1103(b)(2)(A), upon which the administrative judge relied, does not require it to inform each potentially affected person individually of any change in its regulations. OPM submits that, in the absence of any obligation, imposed upon it either by statute or regulation, to notify Federal employees of the filing deadline at issue here, the deadline may not be waived and that the appellant's application was properly dismissed as untimely filed. Petition for Review at 1-4.

³ Although the appellant was the prevailing party, the administrative judge, in his discretion, did not award interim relief for the reason that it "would serve no useful purpose here." *I.D.* at 6; see 5 C.F.R. § 1201.111(c).

ANALYSIS

One who asserts an entitlement to a retirement benefit bears the burden of proving by preponderant evidence that he meets the applicable criteria for such entitlement. 5 C.F.R. § 1201.56(a)(2); *Huskey v. Office of Personnel Management*, 27 M.S.P.R. 363, 365 (1985), *aff'd*, 790 F.2d 92 (Fed. Cir. 1986) (Table). Since the retirement benefit in question contains a statutorily-imposed filing deadline that the appellant failed to meet, he must show that he is entitled to a waiver of that deadline.

In *Speker v. Office of Personnel Management*, 45 M.S.P.R. 380, 385-86 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991) (Table), the Board found that there were only three bases for waiving a filing deadline prescribed by statute or administrative regulation. First, the statute or regulation may itself specify certain circumstances in which the time limit may be waived. *E.g.*, 5 C.F.R. § 1201.114(f) (the Board will waive the time limit for filing a petition for review for good cause shown). Neither the statute nor the regulation at issue in this appeal, however, provides for waiver of the time limit.

Second, the Board found in *Speker* that an agency's affirmative misconduct might preclude it from enforcing an otherwise applicable rule under the doctrine of equitable estoppel. That doctrine has no applicability here, since the appellant has not alleged that OPM affirmatively misled him as

to the filing deadline, only that OPM failed to notify him of his right to request service credit in time for him to meet the filing deadline.⁴

Third, the Board held that an agency's failure to provide a notice of a filing deadline as required by statute or regulation might warrant a waiver of the filing deadline. See *Harris v. Office of Personnel Management*, 888 F.2d 121, 124 (Fed. Cir. 1989) (waiving the one-year time limit for electing a survivor annuity). Neither the statute at issue here, Pub. L. No. 100-238, nor the implementing regulation, 5 C.F.R. § 831.309, requires OPM to notify employees or annuitants of their right to request service credit for service performed under personal service contracts.

The administrative judge found that OPM's obligation in this regard was based on 5 U.S.C. § 1103(b)(2)(A), which states that the Director of OPM shall take steps to ensure that any proposed rule or regulation, the application of which does not apply solely to OPM or its employees, is posted in offices of Federal agencies, and 5 C.F.R §§ 110.101 and .102, which set forth OPM's obligation to issue bulletins to provide

⁴ Moreover, in *Office of Personnel Management v. Richmond*, 110 S. Ct. 2465, 2467, 2476 (1990), the Supreme Court held that the doctrine of equitable estoppel could not be applied to require the Federal government to grant monetary benefits to an individual who did not meet the statutory requirements for such benefits. To the extent that the Supreme Court's decision in *Richmond* is inconsistent with the second basis set forth in *Speker v. Office of Personnel Management*, 45 M.S.P.R. 380 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991) (Table), for waiving a statutorily or regulatorily-imposed filing deadline, *Speker* is herewith modified accordingly.

notice of its new regulations and the agencies' obligation to post the bulletins in a prominent place.

In *Olds v. Office of Personnel Management*, 34 M.S.P.R. 305, 307 (1987), the Board held that 5 U.S.C. § 1103(b)(2)(A) does not require that OPM inform each potentially affected person individually of proposed regulatory changes. Arguably distinguishing this case is the fact that, as the administrative judge found, the legislative history of the statute here at issue specifically criticized OPM's past practice of providing an inconsistent interpretation of the rules governing personal service contract retirement credit. See House Committee Report accompanying Pub. L. No. 100-238, H.R. Rep. No. 100-374, § 110. Notwithstanding the legislative history, however, Congress, for whatever reason, did not see fit to write into the statute a specific requirement that OPM notify employees or annuitants of the statute's provisions. Further, the record reflects that OPM did, in fact, publish notification of its interim regulations at 5 C.F.R. § 831.309 in the Federal Register of October 25, 1988. Appeal File, Tab 1, Subtab B. Moreover, it is undisputed that on January 27, 1989, OPM issued the FPM Bulletin setting forth the change to its regulations. Agency File, Tab 6. Even though the appellant's installation apparently did not receive the Bulletin until May 1990, OPM's issuance of the Bulletin was sufficient under 5 U.S.C. § 1103(b) because the statute only requires the Director of OPM to take steps to ensure that proposed rules or regulations are posted in Federal agencies.

It does not require that OPM, in every case, be successful in its efforts.⁵

The evidence shows that, through no fault of his own, the appellant did not become aware of his statutory entitlement to seek credit for services he rendered under a personal services contract, or of the time limit for doing so, until after the deadline had passed. Although enforcement of the time limit under these circumstances may appear unfair, we find no basis for requiring OPM to waive it. See *Speker*, 45 M.S.P.R. at 386. Accordingly, since the appellant admits that he applied for service credit on June 24, 1990, we find that he fails to meet the statutory requirement that he apply for benefits by January 8, 1990, and conclude that he is, therefore, ineligible to have his application for service credit considered. See also *Bohannon v. Office of Personnel Management*, 47 M.S.P.R. 114, 117 (1991).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

⁵ The administrative judge found, in the alternative, that, even if the evidence showed that the Department of the Navy had failed in its obligations, its failure would also provide a valid basis for waiver of the filing deadline based on the Department of the Navy's role as OPM's agent. See I.D. at 4 n.5. Since there is no evidence that the Navy acted improperly with respect to the issue of notice, it is unnecessary for the Board to reach the issue of whether the Navy functions as an agent of OPM in this matter.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board